United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2580

4/10 ORIGINAL

United States Court of Appeals

For the Second Circuit

THEODORE GRIECO, JR.,
Plaintiff-Appellant,

against

MEMORIAL HOSPITAL OF GREENE COUNTY,
FRANCIS FUGARO,
Defendants-Appellees,

and

PAUL M. SNAPPER,
Defendant.

On Appeal from the United States District Court for the Southern District of New York

B P/S

BRIEF FOR PLAINTIFF-APPELLANT

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BRIEF FOR PLAINTIFF-APPELLANT

Preliminary Statement

In this action predicated on diversity of citizenship, to recover for negligence and malpractice, plaintiff-appellant appeals from an order of the District Court for the Southern District of New York (Milton Pollack, J.) dated November 12, 1974 (91a), which granted summary judgment of dismissal to defendants-appellees, immediately following service of the complaint.

Bases of Plaintiff's Appeal

By separate notices of motion respectively dated August 22, 1974 and September 17, 1974 (11a, 34a), defendants Memorial Hospital of Greene County and Francis Fugaro, a physician in its employ, moved under Sections 52 and 53 of the County Law to dismiss plaintiff's complaint on the alternative grounds that (a) jurisdictionally, an action against the County of Greene must be commenced only in that County, or (b) plaintiff has failed to serve a notice of claim, within ninety days after the occurrence.

Section 52 of the County Law provides that the place of trial of an action against a county shall be in the county against which suit is brought. Additionally, Sections 52 and 53 thereof require, as a condition precedent to suit against a county or any officer, agent, servant or employee thereof, the service of a notice of claim upon such county.

Branch (a) of the motions to dismiss—that in violation of the County Law, this action was improperly commenced in a Court outside the confines of Greene County, has been abandoned in the exchange of multiple affidavits during the pendency of the motion. Plaintiff had shown that the place-of-trial provision in Section 52 relates exclusively to venue and so cannot affect the jurisdiction of the Federal Court to entertain actions brought against counties (see *Laduke* v. *County of Franklin,* 284 App. Div. 859, 134 N.Y.S. 2d 155; *Scaccia* v. *County of Onondaga,* 11 Misc. 2d 907, 175 N.Y.S. 2d 120; Weinstein-Korn-Miller, *New York Civil Practice,* pars. 504.02, 507.02). It was also submitted to the Court below, that since the instant action was com-

menced in the very Federal District which includes Greene County, plaintiff had fully complied with Section 52, even as to venue (17a-19a). Accordingly, this branch of defendants' motions was unceremoniously dropped, with the result that Judge Pollack in his Opinion omitted any mention of it.

In view of the Court's summary dismissal of plaintiff's complaint on alternative branch (b) alone—the issue posed on this appeal relates to whether the Court correctly declared, as a matter of law, that Memorial Hospital of Greene County and Dr. Fugaro must be treated, respectively, as a department and agent of the County of Greene, so as to invoke the notice of claim requirements of the County Law.

Plaintiff's position is that Memorial Hospital of Greene County, from the time of its inception to the present date, never was nor now is a department or agency of any political subdivision of New York State. From the documentary evidence in the record, it is evident and apparent, plaintiff contends, that defendant hospital is in fact an institution financed and controlled by a separate corporate entity, chartered under the Membership Corporation Law. Plaintiff further argues that at absolute best for defendants on the motions for summary judgment immediately following service of the complaint, there are clear-cut issues of fact, precluding such relief, not only respecting the question of control over Memorial Hospital but in addition, as to whether the doctrines of waiver and estoppel to claim notice of claim privileges should be applied in any event, under all of the circumstances to be detailed hereinafter.

The Documentary Evidence

It is undisputed that Memorial Hospital of Greene County, Inc. is a corporate entity which was formed under the New York State Membership Corporations Law many years ago and is presently in existence pursuant to its successor Statute, the Not-For-Profit Corporations Law.

The certificate of incorporation of Memorial Hospital of Greene County, Inc. was executed on April 9, 1926, by 21 individual subscribers (25a-30a). This document is a viable, existing charter to this date and remains in the custody of the Secretary of New York State. It expressly announces that the sole and exclusive purposes of the corporation thus formed are the erection, establishment and maintenance of a hospital or hospitals for the care of the sick, located in Greene County. The corporate certificate provides, in part (27a):

> "We, the undersigned, all being persons of full age, citizens of the United States and residents of the State of New York, desiring to form a corporation under Article III of the Membership Corporations Law of the State of New York, for the purpose of erecting, establishing and maintaining a hospital or hospitals in the Village of Catskill, Greene County, New York, for the care and treatment of sick and injured persons, do hereby make, subscribe and acknowledge this certificate as follows:
>
> 1. The name of the proposed corporation is Memorial Hospital of Greene County, Inc.
>
> 2. The particular object for which said corporation is to be formed is the erection, establishing and

> maintaining of a hospital or hospitals in the Village of Catskill, Greene County, New York, for the care and treatment of sick and injured persons. * * *''

On or about May 18, 1926, the existence of this corporate entity was certified and approved by the New York State Board of Charities at Albany (26a).

On May 6, 1951, 25 years thereafter, there was executed and filed with the Secretary of State a renewed certification of corporate existence (31a-34a). This document, entitled: ''Certificate of Report of Existence of Memorial Hospital of Greene County, Inc.'' (32a), specifically attests to the fact that with ''no change in name'' [Article 1], the ''existence of the foregoing corporation is hereby continued'' [Article 2] (*id.*).

Completing the documentary proof submitted by plaintiff, showing the continuing existence of Memorial Hospital of Greene County, Inc., for its original purposes, is an up-to-date communication issued to us by the Secretary of State, attesting to these facts (82a): ''Memorial Hospital of Greene County, Inc., a membership corporation, filed 5/20/26, Catskill, Greene County. We have no dissolution filed.'' Plaintiff, in his complaint, allegel the corporate status of the hospital (5a).

Defendants do not challenge the facts that Memorial Hospital of Greene County, Inc. is an entity chartered for the avowed purposes of erecting and maintaining Memorial Hospital and that it is suable without necessity for any prior notice of claim. They seem to argue, however, that these corporate purposes were not fully materialized until the time that an agreement was entered into between

the corporation and the County of Greene and that this document is to be read absolutely as transferring exclusive control of the hospital to the County, so that it became a department thereof.

On the motions, defendants submitted a copy of such agreement, dated December 15, 1931, along with certain enabling legislation authorizing the erection of a hospital to serve Greene County (42a-53a). By the said contract, which—incidentally—has never been placed on file with the Secretary of State, it appears that agreement was reached between the corporation and Greene County to carry out—as therein provided—their common goal of erecting an institution for the care of the sick and infirm.

Plaintiff, of course, takes strong issue with movants' interpretation of the contract between the County and Memorial Hospital of Greene County, Inc. He urges that to construe the agreement as a corporate divestiture of power and/or interest in and to the hospital would be to defy the express terms of the instrument and ignore the very corporate intendments and purposes established and presently in force in the charter of Memorial Hospital of Greene County, Inc.

Turning to the express terms of the agreement between Memorial Hospital of Greene County, Inc. and the County of Greene, dated December 15, 1931:

It first recites that it is entered into between Memorial Hospital of Greene County, Inc., "a membership corporation organized under the laws of the State of New York", designated as "party of the first part" and the County of Greene, designated "party of the second part" (45a).

The preamble follows, declaring that Memorial Hospital of Greene County, Inc. "was organized under the Membership Corporations Law of the State of New York, May 20, 1926, for the purpose of establishing and maintaining in the Village of Catskill, Greene County, New York, a public general hospital for the care and treatment of the sick * * *" (45a); that in view of the inadequacy of corporate funds then on hand to establish and maintain such a hospital, but in light of the facts that the County has a constantly increasing need for such a hospital and that the New York State Department of Health has assured the contracting parties that it will aid in this goal by furnishing one-half of the costs (43a-45a), such a hospital will be established in accordance with the contractual provisions thereafter set forth (46a).

The agreement goes on to provide that Memorial Hospital of Greene County, Inc. will match State funding by contributing one-half of the costs of procuring a suitable site and erecting a public general hospital and by yearly thereafter satisfying any deficit which might arise in the maintenance and operation of the hospital (46a-47a).

The contract then exacts the following obligation of the County as a continuing condition to the duty of Memorial Hospital of Greene County, Inc. to furnish one-half of building costs and yearly expenses (47a):

> "As an express and continuing condition of such contribution by the party of the first part to the erection and maintenance of said hospital, a majority at least of the members of the Board of managers of said county hospital shall be selected, and their successors shall be appointed, by the Board of Supervisors of

> the party of the second part, from the members of the board of directors of the party of the first part, to the end that a majority at least of the Board of managers of said county hospital shall at all times be and consist of members of the board of directors of the party of the first part, and the party of the first part may withhold any contribution * * * toward the erection or maintenance of said hospital in the event of the failure at any time to comply with such conditions."

In conformity with this required staffing "*at all times*" of the hospital Board of Managers with the directors of Memorial Hospital of Greene County, Inc., the very signatory to the agreement on the part of the corporation—George W. Irwin, its President (48a)—became the first member of the Board of Managers of the hospital (52a). By the terms of a resolution dated December 29, 1931, which officially named the hospital as Memorial Hospital of Greene County, Irwin was designated to serve on the hospital Board for a 5 year term. Four additional members were named to the hospital Board, for varying terms. Two of those named—Howard C. Smith (4 year term) and J. Frank Lackey (3 year term) —were selected from the corporate board of directors. The two non-directors serve for 1 and 2 year terms only (50a-53a).

Judge Pollack opined, nevertheless, that moving defendants had conclusively demonstrated that Memorial Hospital of Greene County is a department of the County government itself. The ruling, in essence, was that all of the terms of the contract and of the corporate instruments on file with the Secretary of State firmly command the conclusion that no issue of fact reasonably exists on this score. At the heart of the opinion ordering summary judgment of

dismissal was the Court's determination that "the interlocking factors between the county hospital and the membership corporation are insufficient as a matter of law to affect the former's status as a department of Greene County * * *" (88a).

In making this decision, Judge Pollack found quite persuasive a determination of Judge Lloyd F. MacMahon, in *Pope* v. *Memorial Hospital of Greene County* (SDNY), reproduced at pages 78a-81a of the record herein. There, in a malpractice action totally unconnected with the instant case, the Court, though yielding that "the matter is not free from confusion" (78a), ordered summary dismissal anyway for failure of plaintiff Pope to file a notice of claim under the County Law. It is clear from this opinion in *Pope* that crucial to Judge MacMahon's finding that the hospital had to be a County department was his determination that the membership corporation had dissolved before the occurrence by operation of law, due to its failure to file certain credentials on or before September 1, 1973, pursuant to the Not-For-Profit Corporations Law (80a).

Immediately after the issuance of the *Pope* decision, we at once filed with Judge Pollack a supplemental affidavit arguing that Judge MacMahon had clearly and absolutely erred by misreading the filing requirements of the Statute (73a-77a). We pointed out not only that there had never been any contention by defendants that the corporation had dissolved, but further that pursuant to Section 1011 of the Not-For-Profit Corporations Law, no dissolution of any corporation bound by the filing provisions could come about unless the Secretary of State elected to issue a proc-

lamation ordering its dissolution. Subdivisions (a)(1), (a)(2) and (a)(3) provide that the Secretary of State, after compiling a list of corporations which have not filed, must make the appropriate proclamation of dissolution, file and publish the same. Only then would any such corporation become dissolved, but no such proclamation was ever issued respecting Memorial Hospital of Greene County, Inc. *Indeed, as earlier shown, the Secretary of State specifically acknowledged the contrary—that no dissolution had occurred.* And following this statement by the Secretary of State, the provisions for new filings were repealed altogether [Laws of 1974, chapter 415] dispensing utterly with any need for re-submission of corporate papers. On the basis of our submission of this supplemental affidavit, the Court indicated that Judge MacMahon had mistakenly considered the corporation as dissolved. Thus, Judge Pollack agreed that plaintiff "presents facts to indicate that * * * [the failure to file] did not *ipso facto* destroy the status of the membership corporation as an existing entity", further stating that "plaintiff correctly shows the membership corporation continues to exist" (88a). Still and all, much to our deep disappointment of course, dismissal of the instant case was directed.

POINT I

Defendants failed to meet their burden on the motions for summary judgment to prove conclusively that Memorial Hospital is a department of Greene County. The Court below misinterpreted the documentary evidence of corporate control over that institution and erroneously directed summary dismissal of the complaint.

We appeal to this Court as we feel most aggrieved by the Court's sweeping negation, at the very outset of this case, of all force and effect of the corporate instruments submitted on the motions. What is particularly difficult for us to accept is the Court's conclusion that the departmental status of the hospital remains unimpaired despite its interlocking relationship with the corporation, yet the decision may be scrutinized in vain for any recited fact to support *the apparent assumption by the Court* that the hospital was ever—at any time—a department or agency of any political subdivision of New York State. *The opinion below seems to proceed from an erroneous hypothesis that moving defendants had presented proof demanding matter of law resolution of this case in their favor, notwithstanding the failure of the Court to set forth a single item of evidence to that effect.*

The proof submitted to the Court vividly revealed that the concept of a hospital known as Memorial Hospital of Greene County did not have its inception in any public department or agency of Greene County. The exact opposite is so.

The group of individual incorporators of Memorial Hospital of Greene County, Inc. were solely responsible for the

idea of erecting a Greene County hospital. This is spelled out in its corporate charter of 1926. Today—nearly a half-century later—the corporation remains fully in existence to perform its original purposes. It was not until several years after the incorporation of Memorial Hospital of Greene County, Inc., that the County of Greene saw fit to contractually approve the corporate purposes of erecting a hospital at Greene County, which was to bear the exact name of the corporation.

It is sheerest contradiction in terms to speak of an institution as a public department, when a majority of its managers are not County employees at all but are required to be directors of a private corporation. It is denuding the corporation of its very being as such an entity to declare that another party is exclusively responsible for performing all of its corporate activities and functions.

The evidence demonstrates that the institution which rendered careless and improper treatment to plaintiff was not at all a department of the County government, within the meaning of the law. In fact, no evidence of County control over its funding, management or operation has yet been adduced—by documentary proof or otherwise. Under such circumstances, we respectfully urge and submit that the Court below acted in an unduly precipitous manner in accepting the defendants' bald allegation of County status as matter of law, at this extremely early stage of the litigation, without a clear and convincing showing that the institution functioned in a manner devoid of corporate control.

That the hospital is the corporation or its alter ego in every real sense—as the public files demonstrate—is mani-

fest from the corporate power to staff the hospital management with corporate personnel as well as its power to cut off all funds in the event of a default in this firm, unequivocal guarantee of control. The corporate commitment is to furnish one-half of such funds—to be matched by the State. The whole concept of funding Memorial Hospital, as shown in its enabling local law (43a-44a) was to see to it "that Greene County would not be called upon to appropriate any funds either for the erection, equipment and maintenance of said County Hospital." To say that despite this, it is the *County,* though contributing nothing, which solely controls the hospital as a department thereof, is to defy the documentary foundations on which the institution exists and issue a definitive ruling absent any supportive proof.

While all membership corporations exist for non-profit purposes, they are, of course, amenable to suit in precisely the same manner as other private corporations. Membership corporations "have power in furtherance of corporate purposes—(1) To have perpetual duration. (2) To sue and be sued in all courts and to participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise in like cases as natural persons" (Not-For-Profit Corporations Law §202).

In *Bing* v. *Thunig,* 2 N.Y. 2d 656, the Court was explicitly clear in indicating that corporations not organized for profit are nevertheless fully liable in tort by ordinary actions at law. It wrote the following, in denying immunity to a charitable hospital (2 N.Y. 2d at 666-667):

> "Charity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing.
>
> * * *

> The test should be for these institutions, whether charitable or profit-making, as it is for every other employer * * *."

Thus, no inference of Greene County departmental status arises at bar from the mere fact that the hospital may have been founded and today operates to fulfill the public-spirited purposes and goals of its incorporators to heal the sick of Greene County. The charitable and/or beneficial ideals which achieve fulfillment by the concept of a so-called "public hospital" do not alter the fact of private, non-municipal jurisdiction and control over its finances and management.

Well illustrative of this point is *Halberstadt* v. *Kissane*, 51 Misc. 2d 634, 273 N.Y.S. 2d 601, affd. 31 A.D. 2d 568, 294 N.Y.S. 2d 841. There, neither Special Term nor the Appellate Division would decree that a privately controlled hospital was a public institution, despite its receipt of public funds or tax-exempt status. The Court wrote (273 N.Y.S. 2d at 604-605):

> "The Alice Hyde Memorial Hospital is not a public corporation * * *. Public hospitals are such as established by the State; such as are established by municipalities and not maintained privately or under private control."

In *Van Campen* v. *Olean General Hosp.*, 210 App. Div. 204, 205 N.Y.S. 554, affd. 239 N.Y. 615, the Court declared:

> "There are many public institutions in this state, devoted to the care of afflicted and unfortunate people. * * * Corporations organized by permission of the Legislature undertake to perform similar duties. They are supported mainly through voluntary gifts. These

> are private corporations. That they are engaged in charitable work for the benefit of the public, and thereby affected with a public interest, does not make them public corporations * * *."

As stated in 14 CORPUS JURIS, *Corporations,* pages 73-74:

> "[P]ublic corporations are such as are created by the people or the government, state or federal, for political or governmental purposes * * * where the whole interest belongs to the government * * * while private corporations are such as are created or formed by voluntary agreement of their members, by or under legislative authority, either for purely private purposes and for the private benefit of their members, as in the case of an ordinary business corporation, or for purposes partly private and partly public, as in the case of a railroad company or for a public purpose, where the entire interest does not belong to the government as in the case of a bank, hospital or university, the whole interest in which is not in the state. A corporation therefore is not a public corporation merely because it is founded for a public charity, or because the public is interested therein in that it is intended to and will promote the public interest or convenience, or because the institution or undertaking was founded or is supported in part by donations of land or money from the government * * *."

With especial consideration to the above authorities, it is respectfully urged that the Court below was insensitive to the realities of corporate control of Memorial Hospital of Greene County, Inc. which permeate the operation and management of the very institution which bears its name—Memorial Hospital of Greene County. It will be recalled on this score that the contract specifically recites that Memorial Hospital of Greene County, Inc. was formed and exists as a *corporate entity* for the exact and precise goal,

intendment and end of erecting and maintaining a public institution within the County of Greene. Thus, the very first paragraph thereof explicitly spells out that Memorial Hospital of Greene County, Inc. "*was organized under the Membership Corporations Law of the State of New York, May 20, 1926, for the purpose of establishing and maintaining in the Village of Catskill, Greene County, New York, a public general hospital for the care and treatment of the sick* * * *" (45a) (emphasis supplied). Indeed, in 1951, 20 years after the hospital was erected and named for the corporation, the said corporation—in its renewal certificate —specifically stated that its name would remain Memorial Hospital of Greene County, Inc. (31a-32a).

If defendants' motion papers show anything other than the vesting of exclusive control of the hospital in the corporate board of directors, that alternative showing might conceivably be that the hospital is actually a partnership or joint venture created in a contract between the said membership corporation and the County of Greene. This new creation or partnership would not be a county or a department of a county, but simply a new entity suable as any other such partnership or venture by service of process upon any one of the partners. (See CPLR §310; *Pedersen* v. *Manitowoc Co.*, 25 N.Y. 2d 412). This was precisely what was accomplished here, namely, service of process upon at least one of the partners if not both as well as upon Mr. Fugaro, one of its resident employees.

The fact remains that the non-public status of the hospital, so recorded in the Office of the Secretary of State, is unequivocal documentation that it is definitely not an entity entitled to the privileges accorded political subdivi-

sions only in the notice of claim statutes. The contractual vesting of managerial power over the hospital in the corporate board of directors as a condition precedent to corporate contribution of operating costs of the hospital gives new truth to the non-County character of the institution. Any summary determination to the contrary—hastily negating even the possibility of the existence of a question of fact on the point—is clearly violative of the realities of the relationship between the contracting parties (*Walkovszky* v. *Carlton*, 18 N.Y. 2d 414). Further, such a determination unfairly charges plaintiff with an intolerable burden of proof to survive a motion for summary judgment brought on by those with exclusive knowledge of all of the details indicative of the extent to which the corporation and hospital are inter-related or are one and the same in day-to-day management, control and operation (see FRCP, Rule 56 [f]). Considering the obvious inequality of knowledge which obtains between plaintiff on the one side and moving defendants on the other, all evidence must be viewed in the light most favorable to plaintiff and every doubt as to what the facts may be or whether issues of fact are present must be resolved strictly in his favor (*First National Bank of Cincinnati* v. *Pepper*, 454 F. 2d 626 [2d Cir.]; *Dolgow* v. *Anderson*, 438 F. 2d 825 [2d Cir.]; *Doehler Metal Furniture Co.* v. *United States*, 149 F. 2d 130 [2d Cir.]; *United States* v. *Pan-American Mail Lines, Inc.*, 359 F. Supp. 728 [SDNY]). In the *Pope* case, the Court explicitly noted its "confusion" as to the actual facts (78a), yet saw fit to decree summary dismissal on motion, before this confusion might be resolved as the litigation progressed through its pre-trial and trial stages. That disposition, under the authorities, was surely error.

Geletucha v. *222 Delaware Corp.*, 7 A.D. 2d 315, 182 N.Y.S. 2d 893, 895-897, reargument den. 8 A.D. 2d 999, 188 N.Y.S. 2d 980, is apropos:

> "The question of corporate control was strenuously disputed at trial but * * * the Trial Justice refused to submit that question to the jury.
>
> * * *
>
> It need not be argued that management and control could be so extensive and of such type and character that under it and without more the management corporation would clearly be liable for the tortious acts of the agent corporation. But in this case there is also present the relationship and activities of the parties as above outlined all of which must be considered in determining liability, or lack thereof.
>
> * * *
>
> In our opinion, the matter should have been submitted to the jury for a determination of the factual issues involved, and the failure to do so requires a reversal and a new trial."

The Court, in *Geletucha,* followed the rule that such issues involve questions of fact only, as announced in Fletcher's CYCLOPEDIA OF CORPORATIONS (see 182 NYS 2d at 896):

> " 'This question of fact depends on many circumstances overcoming or failing to overcome the indicia of separate entities, sameness of members, officers and objects, and the absence of distinct interest, being indicia of agency or identity * * *.' "

Similarly, in *Mangan* v. *Terminal Transp. System,* 157 Misc. 627, 284 N.Y.Supp. 183, affd. 247 App. Div. 853, 286 N.Y.Supp. 666, also involving interlocking directorates, it was held (284 N.Y.Supp. at 190-191) that the matter of

realities of control is a consideration which takes precedence over "attempted separation" of entities which would "work a fraud upon the law". In *Gerard* v. *Simpson,* 252 App. Div. 340, 299 N.Y.Supp. 348, concerning the issue of the responsibilities of two quasi-public corporations which were entwined by common purposes, the Court held that the evidence "raised a question of fact for the jury to determine in respect to the ownership, operation, and control" of the offending instrumentality. In sum, as the power of the purse and the power to staff the long-term managerial personnel of the hospital with corporate directors have been retained by the corporation to itself for over 50 years now, its control over the institution is manifest and abundant (see *New York Cent. R. Co.* v. *New York & Harlem R. Co.,* 275 App. Div. 604, 90 N.Y.S. 2d 309). Thus, it is a shrill and specious plea which seeks to claim County status as matter of *fact,* let alone of law, and thereby improperly deny to suitors their long-settled regular rights at law.

POINT II

Defendants are bound by the terms of the corporate documents on file in the Office of the Secretary of State. They are estopped from claiming that the hospital is a department of Greene County.

The hospital must be charged with the obvious results of its failure to qualify or limit its filings as a corporation with the New York Secretary of State. This is the depository which dispenses critical corporate information to the public. It would be inherently unjust and surely inappropriate to permit the hospital to resist meritorious

tort claims on the basis of an arrangement allegedly insulating it against ordinary liability, hidden from the view of the Secretary of State and thus the public at large. The purpose of the notice of claim statutes is to enable counties and other municipalities—*acting in good faith*—to obtain reasonably prompt notice of an occurrence. Hardly was it the intendment of such legislation to permit an undercover relationship unknown to the Secretary of State or those who consult his official office (*Quintero* v. *LIRR,* 55 Misc. 2d 813, 286 N.Y.S. 2d 748, affd. 31 AD 2d 844, 298 N.Y.S. 2d 109). The County of Greene should be bound by the terms of the filings it caused, permitted and/or suffered to be made, and not allowed to subvert its own portrayal of exclusive corporate control.

The law abhors—as it must—such secretive conduct to limit or negate tort liability. It will not tolerate the device of an outright trap, masking from view the alleged true status of an institution.

In *Velez* v. *Craine & Clark Corp.,* 33 N.Y. 2d 117, the Court refused to bind an innocent tort victim to a disclaimer of liability contained in a contract between other parties. The Court reversed the ruling below against recovery, on the grounds that "plaintiffs were complete strangers to the contract; there is no evidence that either of them ever saw the invoice in question or knew of its contents" (p. 125). Even more recently, in *Rosado* v. *Eveready Ins. Co.,* 33 N.Y. 2d 43, the Court of Appeals struck down a hidden limitation on insurance coverage on the ground that it violated the public policy of this State to protect innocent victims of accidents caused by negligence.

No less of a public policy exists in the instant case to safeguard the legitimate rights of a wholly non-culpable victim of medical and hospital neglect. It would be patently unjust to affirm dismissal of an action founded on publicly recorded facts certifying the corporate status of the very entity for which the hospital was and still is named.

It offends principles of fair play, to bind an innocent plaintiff to a private arrangement, unknown to him, in derogation of the data permitted to remain on file in a statewide public depository. In the posture of the evidence, waiver and/or estoppel is very much in order, even assuming for argument's sake only that hospital control is somehow vested exclusively in the County. The doctrines of waiver and estoppel, which prevent unconscionable use of notice of claim defenses, are very much in order against public entities (*Buffalo Mission, Inc.* v. *City of Syracuse*, 33 A.D. 2d 152, 306 N.Y.S. 2d 963; *Robinson* v. *City of New York*, 24 A.D. 2d 260, 265 N.Y.S. 2d 566; *Daley* v. *Central School Dist.*, 21 A.D. 2d 976, 252 N.Y.S. 2d 899, 900, affd. 17 N.Y. 2d 530; *Matter of Estate of Handman*, 67 Misc. 2d 841, 325 N.Y.S. 2d 362, 365; *McKiernan* v. *Board of Ed.*, 1 Misc. 2d 925, 149 N.Y.S. 2d 923).

Pugh v. *Board of Education*, 38 A.D. 2d 619, 326 N.Y.S. 2d 300, affd. 30 N.Y. 2d 968, which was cited by the Court below in support of its summary ruling that there is "no basis for the application of either waiver or estoppel" (86a), is not in point. Its holding must be read against the background that there was at all times an open and full disclosure of public control over defendant Board of Education. In the present situation, wholly to the contrary, it

is the total lack of candor practiced by the County which clearly gives rise to issues of fact on waiver and estoppel.

Here, just as in *Planet Const. Corp.* v. *Board of Education*, 7 N.Y. 2d 381, 386: "[T]riable issues of waiver and estoppel [are] present in the case and * * * summary judgment was improvidently granted." To the exact same effect is *Arc Electrical Co.* v. *City of New York*, 44 A.D. 2d 783, 355 N.Y.S. 2d 102, 103, in which the Court, speaking of the doctrine of estoppel, held "that there is an issue of fact on this score, not susceptible of resolution on the papers before us but requiring a trial."

It is the "policy of this State * * * to reduce rather than increase the obstacles to the recovery of damages for negligently caused injury or death, whether the defendant be a private person * * * or a public body * * *" (*Abbott* v. *Page Airways*, 23 N.Y. 2d 502, 507). It is respectfully contended that affirmance here would do violence to that established policy, and countenance evasion of the rule of fair dealing, which must govern all of us equally.

Conclusion

The order appealed from should be reversed and defendants' motions for dismissal of plaintiff's complaint should be denied.

Respectfully submitted,

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Attorneys for Plaintiff-Appellant

HERMAN SCHMERTZ
Of Counsel

Job #3783

Affidavit of Service by Mail

In re:

Grieco v. Memorial Hospital of Greene County, Fugaro and Snapper

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on JAN 10 1975, 197..., he served 2 copies of the within Brief in the above named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

Maynard, O'Connor & Smith, Esqs.
Attorneys for Defendants-Appellees
Barclay Heights, Route 9W
Saugerties, New York 12477

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 10th day of Jan. 1975

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1975